86-186

Supreme Court, U.S.
FILED
AUG 4 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

DAY & ZIMMERMANN, INC., §
§
Petitioner §
§
vs. §
§
INTERNATIONAL CHEMICAL WORKERS §
UNION and Local 526 OF THE §
INTERNATIONAL CHEMICAL WORKERS UNION, §
§
Respondents §

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

**********

# PETITION FOR WRIT OF CERTIORARI AND APPENDIX

**********

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Attorney for Petitioner

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## QUESTION PRESENTED FOR REVIEW

The arbitrator was appointed under the 1978-81 labor agreement to decide a dispute under that agreement. The district court, without making any finding that the arbitrator had authority under the 1978-81 agreement, or otherwise, to interpret subsequent labor agreements, returned this matter to the arbitrator for him to determine "whether the award has prospective application under collective bargaining agreements entered into between the parties subsequent to the expiration of the 1978-81 agreement." (App. A-28)

The question presented is whether the Court of Appeals erred at law in refusing to remand this matter to the district court with instructions that before returning this matter to the arbitrator for such a determination, the district court must first make a finding that the arbitrator has arbitral authority to make

such an interpretation of collective bargaining agreements entered into subsequent to the expiration of the 1978-81 agreement. AT&T Technologies vs. CWA, ____ US ____, 106 S.Ct. 1415, 121 LRRM 3329 (April 7, 1986).

## PARTIES TO THE ACTION

The parties to this action are all listed in the caption of this case. Petitioner Day & Zimmermann, Inc., is a Maryland Corporation with principal place of business in Philadelphia, Pennsylvania. The stock of Petitioner is not publicly traded, and all of its subsidiaries are wholly owned.

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OFFICIAL AND UNOFFICIAL REPORTS
OF OPINION OF THE UNITED STATES COURT
OF APPEALS FOR THE FIFTH CIRCUIT

IN NO. 85-2471, FILED JUNE 9, 1986

International Chemical Workers Union, et al, vs. Day & Zimmermann, Inc., 791 F.2d 366, 122 LRRM 2577.

## STATEMENT OF GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED

(a) The Opinion of the court was entered on June 9, 1986.

(b) The Order Denying Petition for Rehearing was entered on July 10, 1986.

(c) This action was brought by the Union under the provisions of Section 301 of the Labor Management Relations Act of 1947, 29 USC §185, and the Declaratory Judgment Act, as amended, 28 USC §§2201 and 2202.

(d) This Petition for Review on Writ of Certiorari is made under Rule 17(c) on

the grounds that the Fifth Circuit has in this case decided a federal question in a way which conflicts with an applicable decision of this Court. AT&T Technologies vs. CWA, ___ US ___, 106 S.Ct. 1415, 121 LRRM 3329 (decided April 7, 1986).

## STATUTORY PROVISIONS

The above referred to statutory provisions are set forth in the Appendix.

## STATEMENT OF THE CASE

On November 10, 1980, the Union filed a grievance under the 1978-81 labor agreement contending that the Company had, in violation of such agreement, subcontracted street work. The Company denied that it had subcontracted any street work and pointed out that the U.S. Army had contracted for certain street work on its Lone Star Army Ammunition Plant. The grievance was appealed to arbitration and

was heard by Arbitrator Albert V. Carter on October 6, 1981. (App. A-63)

In his award of December 15, 1981, the arbitrator found that the Company had not subcontracted any street work, but that, nevertheless, the Company had violated the labor agreement when the U.S. Army had contracted for street work on its Lone Star Army Ammunition Plant located entirely within a federal enclave. (App. A-74) The arbitrator retained jurisdiction to determine backpay for Company employees. (App. A-87)

The Company refused to abide by the arbitrator's award, and the Union brought this action in the U.S. District Court on March 10, 1982, under the provisions of 29 USC §185, to enforce the arbitrator's award. The district court tried this matter on March 22, 1983, and entered its Judgment on May 29, 1985, upholding the arbitrator's award and directing that the

matter be remanded to the arbitrator for determination of backpay. The district court also directed the arbitrator to determine "whether the award has prospective application under collective bargaining agreements entered into between the parties subsequent to the expiration of the 1978-81 agreement." (App. A-28)

The district court's decision was appealed to the United States Court of Appeals for the Fifth Circuit, and oral argument was heard on February 5, 1986. The decision of the Court of Appeals was entered on June 9, 1986. The Company petitioned for rehearing on the basis of the Supreme Court's decision of April 7, 1986, in AT&T Technologies, Inc., vs. CWA, supra, but this petition was denied on July 10, 1986. (App. A-26)

## ARGUMENT

The Court of Appeals in the case here involved quoted from the 1978-81 labor

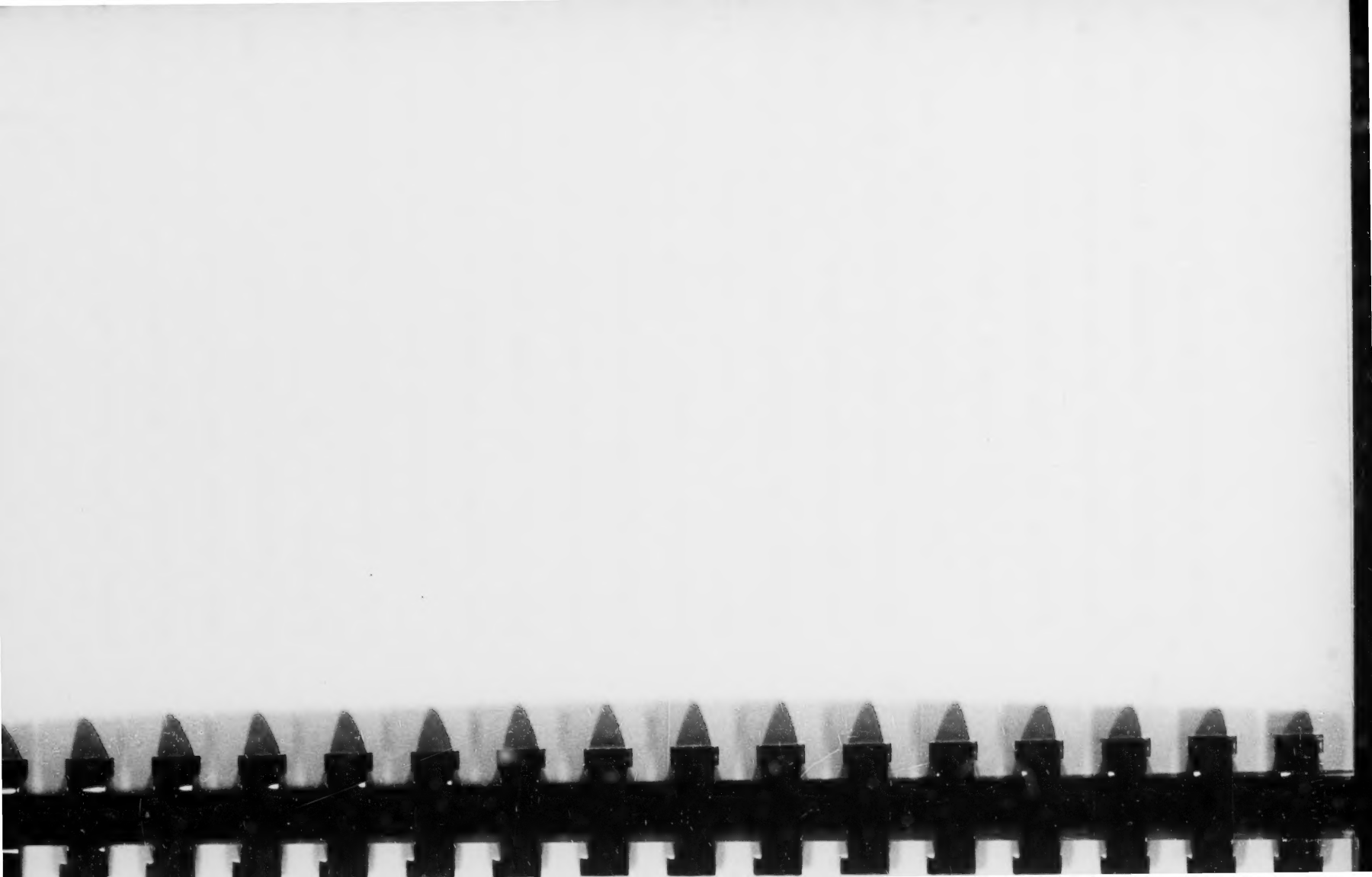
agreement the definition of an arbitrable grievance as a dispute "over the interpretation or application of the terms of this agreement" (emphasis supplied) (App. A-8). Nevertheless, the Fifth Circuit affirmed the district court's judgment that the arbitrator must decide whether his award "has prospective application under collective bargaining agreements entered into between the parties subsequent to the expiration of the 1978-81 agreement." (App. A-28)

A dispute over whether a prior award under a prior agreement has application to a subsequent agreement clearly includes a dispute over the interpretation of the subsequent agreement. Thus, it appears that the district court referred to arbitration a matter that is not arbitrable under the 1978-81 agreement. In any event, under well-established principles of arbitral law, the question

of prospective application of the award to a subsequent agreement should not have been submitted to the arbitrator without a finding by the district court that such was an arbitrable matter.

The Fifth Circuit in the case here involved made exactly the same error which the Seventh Circuit made in Communications Workers of America vs. Western Electric Co., 751 F.2d 203, 118 LRRM 2121, 2124 (7th Cir. 1984). The Seventh Circuit there affirmed the district court's failure to determine the question of arbitrability of an issue before ordering that the matter be referred to the arbitrator.

In reversing the Seventh Circuit, the U.S. Supreme Court in AT&T Technologies vs. CWA, ___ US ___, 106 S.Ct. 1415, 1418, 121 LRRM 3329, 3331 (April 7, 1986), held that it was the duty of the district court to determine arbitrability of a disputed issue before directing that the arbitrator



decide the merits of such disputed issue. The Court stated:

> "Unless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator. . . ."
> (Emphasis Supplied)

The Court of Appeals concluded its Opinion in the case here involved by stating that the arbitrator must be given broad discretion in devising a remedy and that: (App. A-23, A-24)

> "The district court merely pointed out to the arbitrator that there is a later agreement and that it also has different terms. These are facts that the arbitrator may properly consider in fashioning his remedy. . . . Of course, the company will be able to attack the remedy later if it is not based upon the 'essence' of applicable bargaining agreements. . . ."
> (Emphasis Supplied)

This is clearly contrary to the holding of the Supreme Court in AT&T Technologies vs. CWA, supra. There is obviously a very substantial difference

between (a) a district court's initial determination of whether the arbitrator has authority to decide a matter and (b) a district court's later determination of whether an arbitrator's award is within the "essence" of the agreement. Safeway Stores vs. Local 111, Bakery Workers, 390 F.2d 79, 67 LRRM 2646 (5th Cir. 1968).[1] Arbitrability determination must correctly apply the law and may not be factually clearly erroneous, but "essence" may be found in an arbitrator's award which errs at law and is factually clearly erroneous.

Any effect which Arbitrator Carter's award under the 1978-81 agreement might

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[1]As stated in the Fifth Circuit's Opinion: (App. A-11)

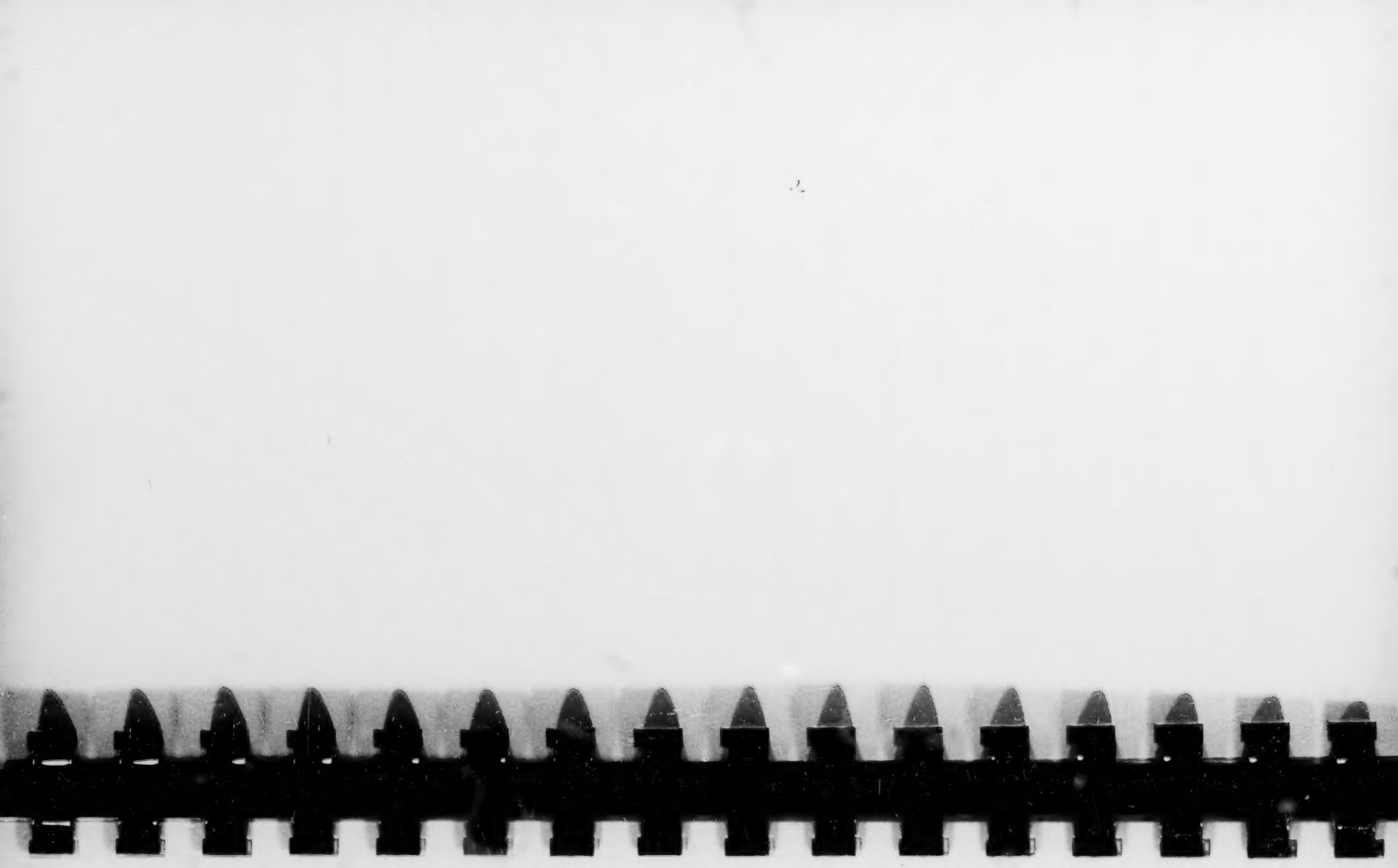
> "Even if this court disagrees with the arbitrator's award, we must uphold it unless it is so 'palpably faulty that no judge . . . could ever conceivably have made such a ruling . . . ' Safeway Stores v. American Bakery & Confectionery Workers, 390 F.2d 79, 82 (5th Cir. 1968)."

have on the terms of a subsequent labor agreement can only be resolved under the provisions of such subsequent agreement. (See Article XXXVI of the 1981-84 agreement at App. A-89) Any unresolved dispute over such effect would clearly be subject to arbitration under such subsequent agreement by an arbitrator selected under the terms thereof. How Arbitration Works, 4th Edition (BNA, 1985), Elkouri and Elkouri, pp. 426-427.

## CONCLUSION

For the reasons set forth above, the Petitioner respectfully urges as follows:

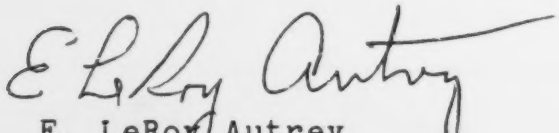
(1) That, pursuant to this Court's holding in AT&T Technologies v. CWA, supra, the Judgment of the Court of Appeals be vacated by summary disposition under Rule 23.1 with this case being remanded to the Court of Appeals with instructions for it to remand this case to



the district court with direction that before returning this matter to the arbitrator for his determination of any prospective application of his award to a subsequent labor agreement, the district court must first make a finding that the arbitrator has arbitral authority to decide such disputed issue; and

(2) That, in the alternative, this Petition for Writ of Certiorari be granted and the Petitioner be allowed to file a brief and make oral argument in support of its above contentions.

Respectfully submitted,



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UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

INTERNATIONAL CHEMICAL WORKERS UNION and LOCAL 526 OF THE INTERNATIONAL CHEMICAL WORKERS UNION,
Plaintiffs-Appellees

v.

DAY & ZIMMERMANN, INC.,
Defendant-Appellant

No. 85-2471

OPINION

Filed June 9, 1986

Before: Jerre S. Williams, Will Garwood and Edith H. Jones, Circuit Judges.

Opinion by Judge Jerre S. Williams

Appeal from the United States District Court for the Eastern District of Texas
William M. Steger,
District Judge, Presiding

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OPINION

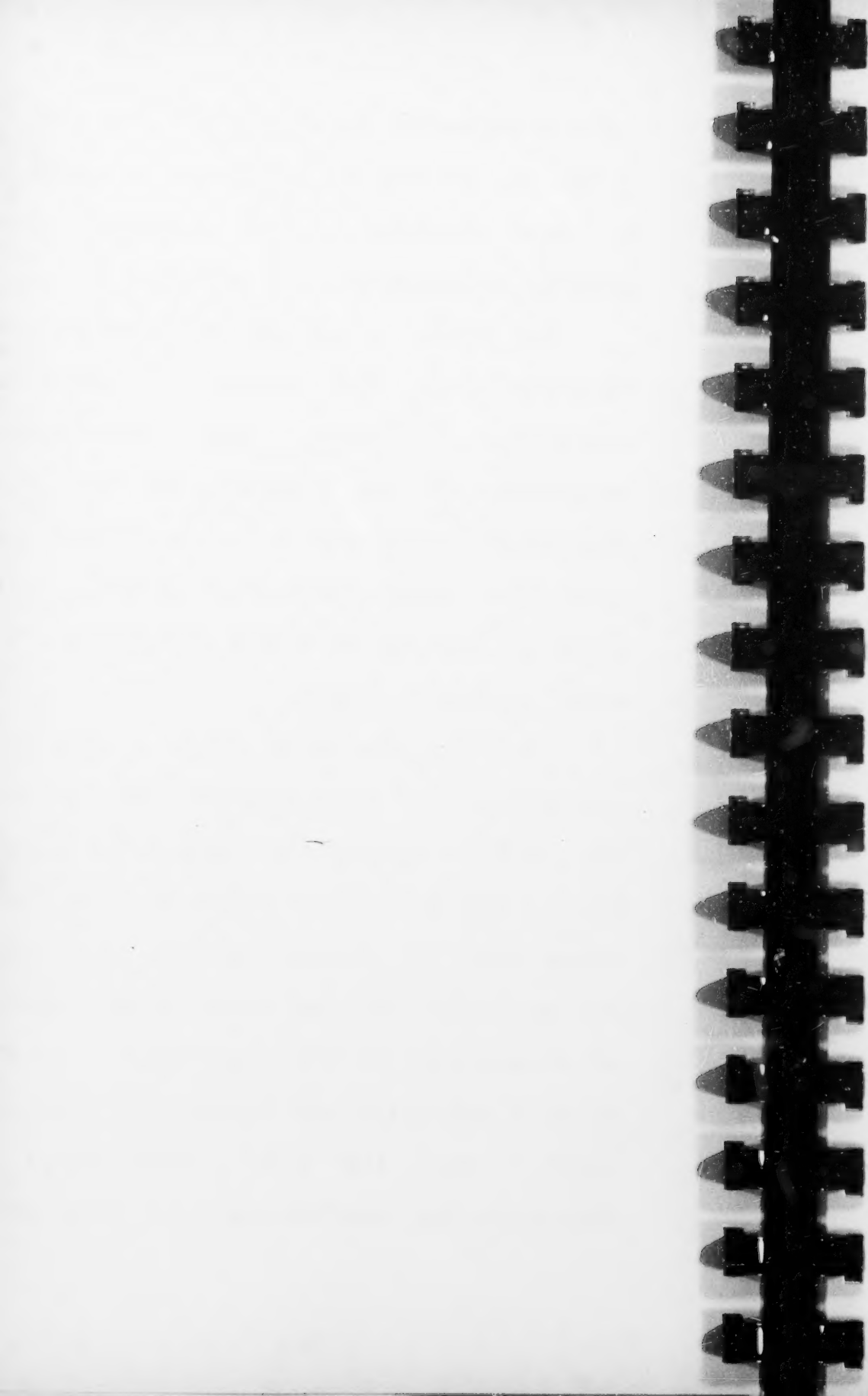
JERRE S. WILLIAMS, Circuit Judge:

The International Chemical Workers Union and Local 526 (union) brought this action against Day & Zimmermann, Inc. (company) pursuant to § 301 of the

Labor-Management Relations Act, 29 U.S.C. § 185, to enforce an arbitrator's award in a labor dispute. The district court granted enforcement. We affirm.

The union is the exclusive bargaining representative for certain production, inspection, stores, and maintenance employees of the company at the U.S. Government-owned and U.S. Army-controlled Lone Star Army Ammunition Plant. The plant is located within a federal enclave near Texarkana, Texas.

In 1980, the union filed a grievance contending that the company had violated the 1978-81 collective bargaining agreement. The grievance complained of "work being done by subcontractors of digging out and other related work in maintenance of street work on the plant site. . ." The union's complaint was based upon the contention that the U.S. Army Corps of Engineers was performing road work which



was customarily performed by bargaining unit employees. The company responded that it had no control over the decisions of the Army Corps of Engineers as to the work it would do. Thus there was no violation of the contract.

This grievance was taken to arbitration by the union under the terms of the labor contract. The arbitrator found that the company had not subcontracted any street work, but, nevertheless, the company had violated the agreement when the U.S. Army did work customarily done by bargaining unit employees. The arbitrator found that this constituted a breach of Article II § 4 of the agreement, which provides in pertinent part:

> No persons excluded from the bargaining unit shall be permitted any of the work customarily done by those employees included in the bargaining unit.

The company refused to accept the arbitrator's award, and the union brought

suit in district court for enforcement. The district court enforced the award, emphasizing the deference that must be given an arbitrator's decision. Because the arbitrator had not yet made a concrete award of damages, the district court remanded the grievance to the arbitrator to fashion an appropriate monetary remedy. The arbitrator was also directed to determine whether the award would include compensation for violations under collective bargaining agreements entered into subsequent to the expiration of the 1978-81 agreement.

On appeal to this Court, the company argues that the district court erred in upholding the arbitrator's award because: (1) the grievance was not arbitrable; (2) the arbitrator's award did not draw its "essence" from the contract; and (3) the court overstepped its authority in remanding to the arbitrator the issue of

whether the award would apply to collective bargaining agreements subsequent to the 1978-81 agreement.

## I. DECISION OF THE ARBITRATOR

[1] As the Supreme Court established in the Steelworkers trilogy,[1] a court reviewing an arbitration award may not address issues that go to the "intrinsic merits" of a dispute, and must limit its review to (1) whether the subject matter of the dispute is "arguably arbitrable"; and (2) whether the award draws its "essence" from the collective bargaining agreement. See International Ass'n of Machinists v. Texas Steel, 639 F.2d 279, 281 (5th Cir. 1981).

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[1]The Steelworkers trilogy consists of Steelworkers v. American Mfg. Co., 363 U.S. 564, 80 S.Ct. 1343, 4 L.Ed.2d 1403 (1960); Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 80 S.Ct. 1347, 4 L.Ed.2d 1409 (1960); and Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 80 S.Ct. 1358, 4 L.Ed.2d 1424 (1960).

Arbitrability

[2] The company contends that the dispute was not arbitrable. The company first argues that the grievance complained only of the company's subcontracting work, not work performed by the U.S. Army. We note that "labor grievances are not subject to the same niceties of pleading applicable in federal courts; and that . . . substance must prevail over procedural technicalities." Id. at 282. Of substantial weight is the fact that in a conference with the arbitrator concerning the scope of the grievance before him, counsel for the company expressly gave the arbitrator authority to frame the issue when he stated:

> I think possibly the best thing to do is to let the arbitrator hear it, and when he writes his opinion to decide what the issue is.

The arbitrator characterized the issue posed as whether the company had

breached the labor agreement when work "within the plant site was performed by persons not in the bargaining unit . . ." It is appropriate for "the arbitrator to decide just what the issue was that was submitted to it and argued by the parties." Waverly Mineral Products Co. v. United Steelworkers of America, 633 F.2d 682, 685 (5th Cir. 1980). Of course, if the arbitrator in his opinion stated the issue in terms far beyond his authority, this statement of the issue could not control. We find, however, that the arbitrator stated the issue within his interpretation of the scope of the contract. The parties, knowing the nature of the grievance, gave the arbitrator the authority to decide it. The company did not waive a claim of arbitrability but certainly seemed to accept the scope of the grievance as valid.

The company urges that the grievance was not arbitrable because the authority of the U.S. Army to perform work was not a matter covered by the collective bargaining agreement. The agreement includes a broad arbitration provision. It defines "grievance" as "any misunderstanding, controversy or dispute between the company and the union, or between the company and the employees over the interpretation or application of the terms of this agreement." Article IX of the agreement provides that "any matter that is not adjusted" may be arbitrated "upon written request."

[3] When a labor contract contains an arbitration clause, "[a]n order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts

should be resolved in favor of coverage." Warrior & Gulf, 363 U.S. at 582-83, 80 S.Ct. 1353, 4 L.Ed.2d at ___, quoted with approval in AT&T Technologies v. Comm. Workers of America, 54 USLW 4339 (Apr. 7, 1986). The fact that the U.S. Army performed work customarily done by bargaining unit members can be viewed rationally as a potential violation of Article II § 4 of the contract.[2] We conclude in the next section of this opinion that the arbitrator's award drew its "essence" from the contract. We cannot say that the arbitration clause was not susceptible of an interpretation which covered this dispute.

[4] In addition, no language in the contract can be said clearly to have excluded this grievance from the broad arbitration provision. "In the absence of

---

[2]The grievance itself stated that "the Union contends . . . the agreement is being grossly violated."

any express provision excluding a particular grievance from arbitration . . . only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail. . . ." Warrior & Gulf, 363 U.S. at 584-85, 80 S.Ct. at 1354, 4 L.Ed.2d at ___. The company presented no evidence that this grievance was intended by the parties to be excluded from the arbitration provision. We agree with the district court that "it is settled beyond peradventure that this grievance was 'on its face' governed by the collective bargaining agreement."

The "Essence" of the Agreement

[5] The company's second objection to the arbitrator's award is that it did not draw its "essence" from the bargaining agreement. In determining whether an award arises from the "essence" of a labor contract, the contract should be interpreted "expansively so as to uphold the

award, rather than restrictively." International Ass'n of Machinists v. Texas Steel Co., 538 F.2d 1116, 1121 (5th Cir. 1976), cert. denied 429 U.S. 1095, 97 S.Ct. 1110, 51 L.Ed.2d 542 (1977). All that is necessary to pass muster is that it is "rationally inferable" that in "some logical way" the award was "derived from . . . the contract." Brotherhood of RR Train v. Central of Georgia Ry. Co., 415 F.2d 403, 412 (5th Cir. 1969), cert. denied, 396 U.S. 1008, 90 S.Ct. 564, ___ L.Ed.2d ___ (1970). Even if this court disagrees with the arbitrator's award, we must uphold it unless it is so "palpably faulty that no judge . . . could ever conceivably have made such a ruling . . ." Safeway Stores v. American Bakery & Confectionary Workers, 390 F.2d 79, 82 (5th Cir. 1968).

The company contends first that the persons defined as "excluded" from the

bargaining unit under Article I § 2[3] of the agreement are meant to be the same people to whom Article II § 4--which outlaws work by "excluded" persons--applied.

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[3]Art. I § 2 of the contract provides: The Unit certified by the National Labor Relations Board as Case No. 16-RC-1187, is as follows:

> "INCLUDED:
> All employees in the Production Division, Stores and Transportation Division and Maintenance Labor Department at the Lone Star Army Ammunition Plant.
>
> "EXCLUDED:
> All electrical maintenance employees, all truck drivers and dispatchers, all carpenters and their apprentices, all pipe fitters, plumbers, welders, boiler house operators and air compressor operators and their apprentices, all garage employees, all machine shop employees, all painters and their apprentices, all office, clerical and timekeeping employees, all plant security personnel, all medical employees, all professional employees and all supervisors as defined in the Act. Also excluded are: all heavy duty mechanics, dragline operators, backhoe operators, tractor operators, and motor grader operators in Maintenance Division."

Because the U.S. Army is not listed as "excluded" from the bargaining unit under Art. I § 2, the company concludes that Art. II § 4 is inapplicable to work done by the Army.

[6] The company's view is a possible interpretation of the agreement. Article I § 2, however, is not a definitional section for the entire contract. It is a more reasonable interpretation that Art. I § 2 is merely a provision defining bargaining unit lines, while Art. II § 4 is a totally separate provision dealing with subcontracting. The company's interpretation, if accepted, would mean that Article II § 4 did not limit subcontracting at all except to a very limited number of defined employees. This conclusion would fly in the face of a main purpose of such clauses. These clauses are intended to prohibit or regulate the "subcontracting out" of work to independent contractors

and their employees. Thus, the arbitrator's award was a reasonable interpretation of Article II § 4. This court has no right to reexamine the arbitrator's rational interpretation of that provision. American Manufacturing, 3563 U.S. at 599, 80 S.Ct. at 1362, 4 L.Ed.2d at ___.

[7] The company argues second that Art. II § 4 of the contract states only that the company would not "permit" other entities to do union work. The company asserts that it did not "permit" any work to be done by the Army, and at most it failed to "prevent" the work from being done. This is merely a semantic distinction. It is obvious that a failure to prevent could potentially be viewed as tacit permission. In any event, the arbitrator found that the company did not protest the work done by the Corps, and "it is unknown whether or not the Corps . . . would have proceeded with the

subcontracting [if] faced with opposition from the Company." As we have already noted many times, this Court has no right to reexamine the arbitrator's findings on the merits. We conclude that the arbitrator's award drew its "essence" from the collective agreement.

The company makes much of the fact that it was the U.S. Government that performed the road work. It asserts that enforcement of the arbitration award is unfair because the company was powerless to interfere with U.S. governmental actions. We initially point out that this assertion is factually inadequate. As we have noted, the arbitrator found that the company failed to protest the work done by the Corps, and it was possible that such a protest might have been effective.

[8] In any event, the mere fact that the federal government was involved does

not destroy the validity of the arbitrator's award. In W. R. Grace Co. v. Local Union 759, ___ U.S. ___, 103 S.Ct. 2177, ___ L.ED.2d ___ (1983), an employer suspected of violations of Title VII of the Civil Rights Act of 1964 signed a conciliation agreement with the EEOC. The employer agreed to lay off employees in a manner which the government felt would compensate for past racial and sexual discrimination in hiring. The conciliation agreement, however, was directly contrary to the seniority provisions of the collective bargaining agreement with the union. The employer began layoffs pursuant to the government order, and the union filed a grievance complaining of a breach of the seniority provisions in the labor contract. The arbitrator found in favor of the union. The Supreme Court unanimously affirmed the arbitrator's award, reasoning that the employer did not

have a right to breach the collective contract although the federal government agency had solicited its agreement to do so. Id. at ___, 103 S.Ct. at 2186, ___ L.Ed.2d at ___.

[9] It is not an adequate defense for the company in the present case simply to contend that it was powerless to prevent the U.S. Army from doing the work. Unless the contract between the company and the government authorized the government to insist that it had the sole right to do the work, the company still had to abide by the agreement it had negotiated with the union absent overriding public policy considerations.[4] The lesson of W. R.

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[4]If the company had demonstrated that the government had the right to assign the work to the Army under the terms of the prime contract (between the company and the government), then a contrary arbitration award would be unenforceable. Article XVII of the collective bargaining agreement provided that the collective agreement was made with reference to and subject to the Company's prime contract

liable for breach of a collective bargaining agreement even if actions of the government contributed in part to that

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with the government. Thus, had it been demonstrated that under the prime contract the government had the right to assign the work exclusively to the Army, then the prime contract would overrride Article II § 4 of the bargaining agreement. The arbitrator's award in that case would probably not draw its essence from the collective bargaining agreement because such an award would ignore Article XVII of the agreement. Indeed, the arbitrator himself stated that Article II § 4 would have been "nullif[ied]" if the government had granted the Corps of Engineers "exclusive jurisdiction over road repair and maintenance . . . in conformity with . . . a provision of the Prime Contract."

This scenario, however, is merely hypothetical given the facts of the present case. The company failed to introduce the prime contract into evidence. The company urged that the roadwork at issue in this case was in excess of $100,000 and that exclusive jurisdiction to perform roadwork of that magnitude was vested by the federal government in the U.S. Army Corps of Engineers. That argument is directly contrary to specific findings of fact made by the arbitrator. The arbitrator found:

> [T]he credible evidence is that the Company's Prime Contract with the Government includes road repair and maintenance within the

breach.[5] Having freely negotiated a collective agreement, and having been found by an arbitrator to have violated

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> area of the Lone Star Army Ammunition Plant and contains nothing to restrict the Company from performing roadwork costing in excess of $100,000. The Company's claim that it has no jurisdiction over the roadwork performed by the Corps of Engineers is not persuasive and is not compatible with the credible evidence.

A review of the record reveals that these were not irrational conclusions on the part of the arbitrator. This Court has no authority to re-examine those findings of fact. Int'l U. of Electrical Workers v. Markle Mfg. Co., 582 F.2d 9, 10 (5th Cir. 1978); see also Enterprise Wheel, 363 U.S. at 596, 80 S.Ct. at 1360, 4 L.Ed. at ___.

[5]The general argument that the company could not control the actions of the U.S. Government may enter into the calculus of the correctness of the award. But this contention, in the absence of reference to language in the bargaining agreement, does not contradict the fact that the award was based upon a rational reading of the contract. Because this Court does not have authority to review the merits of the arbitration award, we must limit our review to whether the award drew its "essence" from the contract. See American Manufacturing, 363 U.S. at 599, 80 S.Ct. at 1362, 4 L.Ed.2d at ___ (courts

that agreement, the company may not be heard to complain that it was powerless in the present situation.[6]

[10] The company urges that upholding the arbitrator's award in this case leads to an absurd result because its employees must be paid for work neither performed nor subcontracted. The broad rule of

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"have no business overruling" arbitrator "because their interpretation of the contract is different from his").

[6]We do not mean to suggest that an arbitration award which conflicts with important federal governmental policy objectives is enforceable. It is well settled that "a court may not enforce a collective bargaining agreement that is contrary to public policy." W. R. Grace, ___ U.S. at ___, 103 S.Ct. at 2183, ___L.Ed.2d at ___. In the present case, the company makes no claim that enforcement of this award would violate public policy. We note that an arbitration award based on a violation of a bargaining agreement does not necessarily violate public policy merely because it is proposed to a governmental directive. Id. at ___, 103 S.Ct. at 2186, ___ L.Ed.2d at ___; see also Haynes, The Clash Between Conciliation and Collective Bargaining Agreements: What is an Employer to Do? (Feb. 19, 1984) (on file with University of Texas Law Review).

deference afforded to industrial arbitration, however, "justifies sustaining arbitration awards which at first blush may look rather unreasonable." R. Gorman, Basic Text on Labor Law, p. 585 (1976). For example, in Safeway Stores v. American Bakery, 390 F.2d at 79, the company departed from its practice of ending the pay week on Wednesday and issuing checks the next day, and instead ended the pay week on Friday and issued checks the following Tuesday. The first paycheck under the new system covered only Thursday and Friday, resulting in sixteen hours' pay, and the union filed a grievance charging a violation of a contract provision guaranteeing forty hours' pay each week. The arbitrator sustained the grievance and ordered the employer to pay the employees for an additional twenty-four hours of work even though no work had been performed. This Court upheld the

arbitrator's award because it was based on the terms of the contract. We explained:

> If such a result is unpalatable to an employer or his law-trained counsel who feels he had made a hands-down certainty in a law court, it must be remembered that just such a likelihood is the by-product of a consensually adopted contract arrangement . . . . The arbiter was chosen to be the Judge. That Judge has spoken. There it ends.

Id. at 83.

## II. REMAND TO ARBITRATOR TO DETERMINE REMEDY

The arbitrator, after finding the company liable, did not issue a monetary award, but rather ordered a further hearing on damages. In the meantime, the district court heard this enforcement proceeding. The district court then remanded to the arbitrator to determine an appropriate award. In so doing, the district court noted that the 1981-84 collective bargaining agreement contained

substantially different terms from the 78-81 agreement under which the present grievance was filed. The court directed the arbitrator to determine whether the terms of the new agreement might act as a cut-off of the union's remedy. The company asserts that the district court erred in asking the arbitrator to make this determination. The company urges that the new agreement is a totally integrated document, and thus any grievance filed under the old contract would have no applicablity under the new.

[11] The arbitrator must devise a remedy in this case. In so doing, the arbitrator must be given broad discretion. Enterprise Wheel, 363 U.S. at 597, 80 S.Ct. at 1361, 4 L.Ed.2d at ___. The district court merely pointed out to the arbitrator that there is a later agreement and that it also has different terms. These are facts that the arbitratior may

properly consider in fashioning his remedy. See Oil, Chemical & Atomic Workers v. Rohm, 677 F.2d 492, 495 (5th Cir. 1982) (remand to arbitrator appropriate "when issues submitted were not fully resolved"). Of course, the company will be able to attach the remedy later if it is not based upon the "essence" of the applicable bargaining agreements. We affirm the district court's upholding of the arbitration award and the remand to the arbitrator to construct an appropriate remedy to enforce it.

AFFIRMED.

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IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

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No. 85-2471

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(Filed July 10, 1986)

INTERNATIONAL CHEMICAL WORKERS UNION and LOCAL 526 of the INTERNATIONAL WORKERS UNION,
Plaintiffs-Appelless,

versus

DAY & ZIMMERMAN, INC.,
Defendant-Appellant.

---

Appeal from the United States District Court for the Eastern District of Texas

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ON PETITION FOR REHEARING

( July 10, 1986 )

Before WILLIAMS, GARWOOD and JONES, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

/s/ J. S. Williams
United States Circuit Judge

CLERK'S NOTE:
SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE.

REHG-4

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

TEXARKANA DIVISION

| | | |
|---|---|---|
| INTERNATIONAL CHEMICAL WORKERS UNION AND LOCAL 526 OF THE INTERNATIONAL CHEMICAL WORKERS UNION | § | |
| VS. | § | NO. TX-82-34-CA |
| DAY & ZIMMERMAN, INC. | § | |

(filed May 29, 1985)

JUDGMENT

This action having come on for trial before the Court, without a jury, and the issues having been tried and a decision having been duly rendered, and the Court having this day entered its Memorandum of Decision directing judgment for the reasons stated therein. It is, therefore,

ORDERED, ADJUDGED and DECLARED that Plaintiffs, International Chemical Workers Union and Local 526 Of The International Chemical Workers Union and Defendant, Day

& Zimmerman, Inc., have an arbitrable dispute concerning matters outlined in the pleadings and other papers filed in this cause and that, to the extent rendered, the arbitrator's award in this dispute drew its "essence" from the collective bargaining agreement then in existence between the parties. It is further,

ORDERED, ADJUDGED and DECREED that the arbitration award made in this cause should be REMANDED back to the original arbitrator for clarification of the issue of who should receive a monetary payment under this award, what amount of money each such individual should receive, and whether this award has prospective application under collective bargaining agreements entered into between the parties subsequent to the expiration of the 1978-1981 agreement. It is further

ORDERED, ADJUDGED and DECREED that Plaintiffs shall not recover any of their

attorney's fees from Defendant. However, Defendant shall pay Plaintiffs all of their other costs of action. It is further

ORDERED that the United States District Court for the Eastern District of Texas, Texarkana Division, shall retain jurisdiction of this cause in the event further enforcement proceedings are necessary.

SIGNED this 23rd day of May, 1985.

/s/ William M. Steger
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

TEXARKANA DIVISION

| | | |
|---|---|---|
| INTERNATIONAL CHEMICAL WORKERS UNION AND LOCAL 526 OF THE INTERNATIONAL CHEMICAL WORKERS UNION | § | |
| VS. | § | NO. TX-82-34-CA |
| DAY & ZIMMERMANN, INC. | § | |

(filed May 29, 1985)

MEMORANDUM OF DECISION

Came on for trial before the Court, without a jury, the above entitled and numbered cause and the Court having now considered the pleadings on file, the Pretrial Order and the stipulations of counsel contained therein and having further considered the evidence introduced at the trial of this action, the oral arguments of counsel and the briefs of the parties, the Court hereby makes the following memorandum of decision in accordance with Federal Rule of Civil Procedure 52.

## STATEMENT OF THE CASE

This is an action brought by the International Chemical Workers Union and Local 526 of the International Chemical Workers Union (hereinafter "Plaintiffs") pursuant to Section 301 of the Labor-Management Relations Act of 1947 (hereinafter the "Act"), 29 U.S.C. §185 to enforce an arbitrator's award in a labor arbitration dispute. Plaintiffs also seek relief against Day & Zimmermann, Inc. (hereinafter "Defendant") pursuant to the Declaratory Judgment Act, as amended, 28 U.S.C. §§2201 and 2202. The nature of the relief sought by Plaintiffs in this proceeding is an Order from this Court granting: (1) a declaratory judgment that this dispute is arbitrable and that so far as rendered it draws its "essence" from the collective bargaining agreement; (2) remanding the case to the original arbitrator so that he might fashion a complete

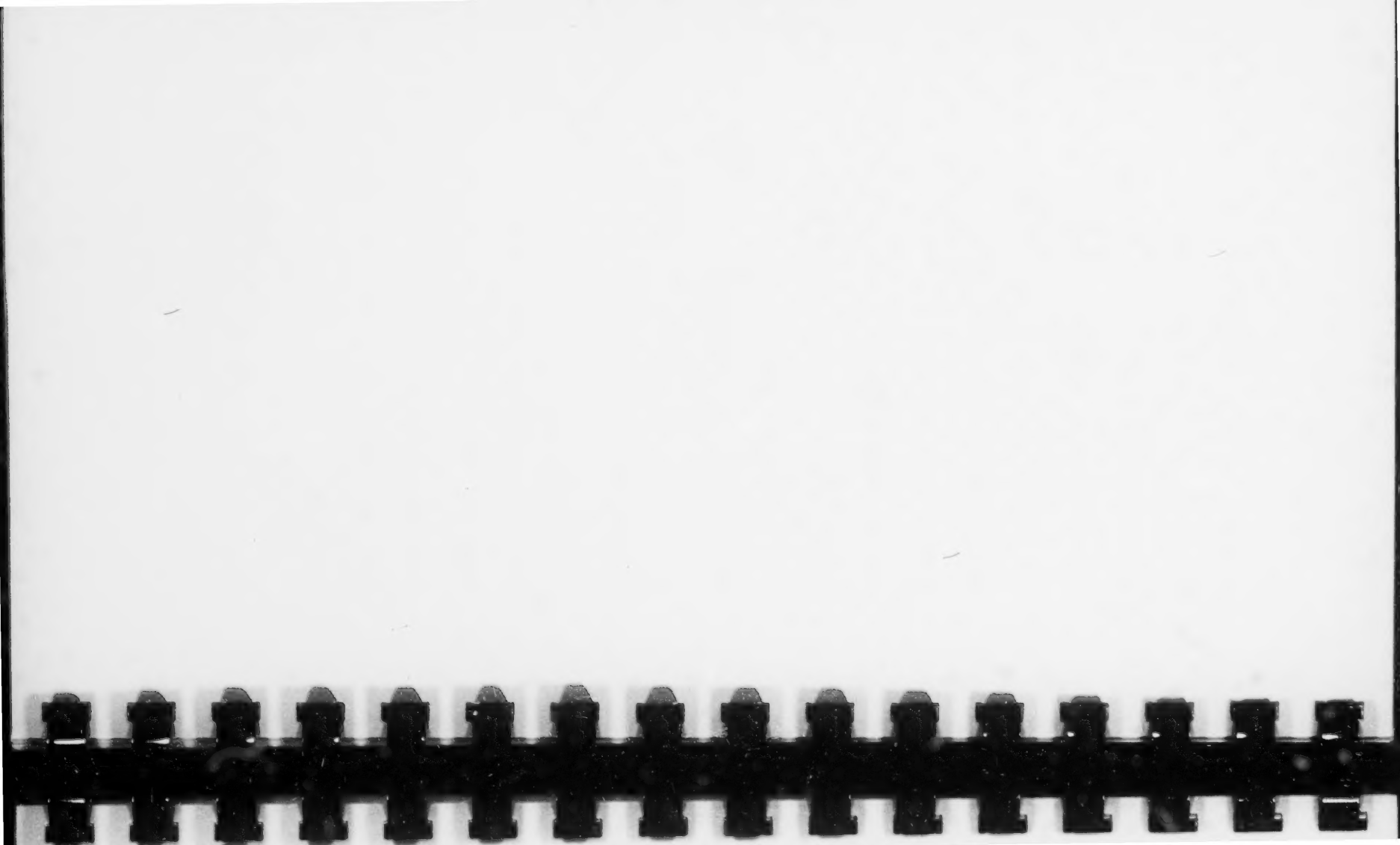
remedy and determine whether the award has prospective application; and, (3) awarding them attorneys' fees and costs.

## THE PARTIES

Plaintiffs are the duly certified, exclusive bargaining representatives for all of the employees of Defendant included in the following description, to-wit: All employees in the production division, inspection division, stores and transportation division and maintenance labor department at the Lone Star Army Ammunition Plant, Texarkana, Texas, and as such, are labor organizations representing employees in an industry affecting commerce, within the provision of §301 of the Act and of the definitions contained in §§2(b) and 501(1) and (3), of the Act, 29 USC §§152(2), 142(1) and (3). Duly authorized officers and agents of Plaintiffs are engaged in representing and

acting for employee members of the Plaintiffs in and about the City of Texarkana, State of Texas, within the territorial jurisdiction of this Court.

The Defendant is a corporation organized and existing under the laws of the State of Maryland, and is present and doing business in or about the City of Texarkana, State of Texas, within the territorial jurisdiction of this Court. Defendant is engaged in the manufacture and sale of howitzer shells and various other engines of destruction in interstate commerce, and is an employer in an industry affecting commerce within the meaning of §301 of the Act, and the definitions contained in §§2(2) and 501(1) and (3) of the Act, 29 USC §§152(2), 142(1) and (3).



## THE FACTS

Plaintiffs entered into a collective bargaining agreement with the Defendant on May 8, 1978, concerning wages, hours and working conditions and which had an expiration date of April 14, 1981. See Plaintiff's Trial Exhibit No. 1. Said contract was at all relevant times in full force and effect between all the parties herein. On November 10, 1980, Plaintiffs filed a grievance alleging that the Defendant had violated the collective bargaining agreement by allowing the United States Government through the use of contractors and subcontractors to perform road repair work, work which in the past had been customarily performed by employees in the bargaining unit represented by the Plaintiffs. Said grievance was filed pursuant to Section 4 of Article II-CWU which reads in relevant part:

> No persons excluded from the bargaining unit shall be permitted to perform any of the work customarily done by those employees included in the bargaining unit.

In a timely fashion, steps were taken to present this grievance to final and binding arbitration, pursuant to Article IX of the contract between the parties.

Ultimately the matter was presented to Albert V. Carter, an arbitrator selected by the parties through the Federal Mediation and Conciliation Service. After a full hearing, Arbitrator Carter issued his arbitration award dated December 15, 1981. See Plaintiffs' Trial Exhibit No. 2. Arbitrator Carter had framed the issue he was called upon to decide as follows:

> . . . The real issue revolves around the right of bargaining unit employees, specifically the classifications of utility operator and maintenance operator, to perform work customarily done by them to the exclusion of all other persons except as provided by

Article II-CWU-Section 4 of the contract.

Exhibit No. 2, pg. VII.

In his decision, Arbitrator Carter found that the grievants had for many years prior to the filing of their grievance "customarily" performed the road repair work in issue. He further found that the disputed work was within the scope of the Defendant's contract (as a manufacturer of munitions) with the government and that when it failed either to assert its right to perform this work or to challenge the right of the U. S. Army Corps of Engineers or its contractors or subcontractors to perform same, it had violated Article II-CWU-Section 4 of the collective bargaining agreement. Although he did not render an exact dollar amount figure, Arbitrator Carter did render an award that all members of Plaintiffs' bargaining unit which were deprived of

road repair work by the use of government contractors and subcontractors were each entitled to an amount of money equal to what they would have earned had they performed the road work. He remanded the matter to the parties and ordered them to attempt to determine the identity of each person entitled to a monetary payment and the number of hours each would have worked, and, therefore, the dollar amount to which each was entitled. He retained jurisdiction, in the event the parties were unsuccessful, to conduct further hearings and to fashion a complete monetary recovery. The parties met pursuant to this direction but were unable to agree on the identity of the individuals entitled to a monetary payment or the amount of such entitlement. Plaintiffs then instituted the present action to enforce the award made by the arbitrator

after the Defendant rejected the award as being void and unenforceable.

## THE DEFENDANT'S CONTENTIONS

The Defendant contends that the arbitrator's award is void and unenforceable because (a) the award exceeded the authority of the arbitrator under the labor agreement and the submission to arbitration; (b) the award is contrary to the clear and unambiguous terms of the agreement and to the uncontradicted and undisputed evidence presented in arbitration; (c) the award did not and could not have any effect on the actions of the United States Corps of Engineers or its contractors, neither of whom is a party to the labor agreement, neither of whom participated in the arbitration hearing and neither of whom agreed to abide by the arbitrator's award; (d) the Defendant could not then and cannot now prevent the

United States Army Corps of Engineers and its contractors from performing road maintenance and repair work on the Lone Star Army Ammunition Plant; (e) if the Defendant can be held to be obligated under the terms of the agreement to prevent the United States Army Corps of Engineers from performing road maintenance and repair work on the Lone Star Army Ammunition Plant, the Plaintiffs must also be held to be so obligated; (f) the Defendant may not be required to pay damages because of the United States Governmental action of having certain road maintenance work on the said plant done by U. S. Army Corps of Engineers contractors; and (g) the award indicated that it would be made applicable after April 15, 1981, when the labor agreement was replaced by an entirely new labor agreement which substantially changed the wording found in Article II-CWU, Section 4 of the 1978-81 agreement

and either deleted or substantially changed all of the other terms of the 1978-1981 agreement.

In contending that this award is not enforceable, the Defendant presents basically the same issues to this Court that it presented to the arbitrator. Its first contention before the arbitrator was that it had been advised by the Army prior to the beginning of the work in issue that, thereafter, any road work amounting to one hundred thousand dollars ($100,000.00) or more would be performed by the U. S. Army Corps of Engineers or its contractors. Its second contention was that the road work in issue was above this one hundred thousand dollar ($100,000.00) threshold limit. Therefore, the Defendant contended to the arbitrator that it had no right to do this work and that, on the contrary, the exclusive jurisdiction for its performance was vested in the U. S. Army Corps

of Engineers. In his award the arbitrator reviewed both of these contentions and found that there was no credible evidence to support either. Therefore, he rejected both.

Next, the Defendant argued to the arbitrator that since it did not subcontract this work, it had not violated the collective bargaining agreement. While the arbitrator agreed with this contention, he found it irrelevant to his findings. His conclusion was that since there was no credible evidence that this work was excluded from the scope of the Defendant's prime contract and since the grievants had "customarily" performed it, the grievants under the collective bargaining agreement had the right to continue to perform this work to the exclusion of all others, including the United States Army Corps of Engineers.

The Defendant now comes to this Court with much the same arguments which it presented to the arbitrator. It argues that the work in issue was within the exclusive jurisdiction of the United States Army Corps of Engineers. It contends that as a government contractor it can only do the work assigned to it by the government and the government assigned this work to the Corps of Engineers, not to it. It argues that since it had no right or authority to perform this work, it would have been impossible for it to have assigned this work to the grievants. Additionally, it argues that the arbitrator's award penalizes it for refraining from doing something that it had no right or authority to do. Distilled to their essence, the various arguments of the Defendant are that the Court cannot enforce this award because it does not draw its "essence" from the collective bargaining agreement.

## STANDARDS FOR JUDICIAL REVIEW OF ARBITRATION AWARDS

No better assessment of the scope of judicial review of arbitration awards could be made by this Court than to quote the recent words of the Fifth Circuit on the subject as found in Local Union 50, International Brotherhood of Electrical Workers, AFL-CIO v. Green Corporation, 725 F.2d 264 (5th Cir. 1984) cert. denied, ___ U.S. ___, 105 S.Ct. 124 (1984). The Court stated:

> Judicial review of arbitration is sharply circumscribed. In Boise Cascade Corp. v. United Steelworkers of America, AFL-CIO, Local Union No. 7001, 588 F.2d 127, 128 (5th Cir. 1979), we observed:
>
> > The scope of judicial review of arbitration awards is limited. The Supreme Court's seminal decisions on this issue are the Steelworkers Trilogy: Steelworkers v. American Manufacturing Co., 1960, 363 U.S. 564, 80 S.Ct. 1343, 4 L.Ed.2d 1403; Steelworkers v. Warrior & Gulf Navigation Co., 1960, 363 U.S. 574, 80 S.Ct. 1347, 4 L.Ed.2d 1409; Steelworkers v. Enterprise Wheel & Car Corp., 1960, 363

U.S. 593, 80 S.Ct. 1358, 4 L.Ed.2d 1424. The Court in Enterprise Wheel held that

> The question of interpretation of the collective bargaining agreement is a question for the arbitrator. It is the arbitrator's construction which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from him.

363 U.S. at 599, 80 S.Ct. at 1362. Similarly, the Court in Warrior & Gulf stated that "judicial inquiry . . . must be strictly confined to the question whether the reluctant party did agree to arbitrate the grievance or did agree to give the arbitrator the power to make the award he made" 363 U.S. at 582, 80 S.Ct. at 1353.

The premise of the Steelworkers Trilogy is that the court should allow the parties to a collective bargaining agreement containing a binding arbitration clause to receive the benefit of the bargaining - binding arbitration on contract disputes.

The scope of enforceable interpretation is concomitantly narrow:

> To merit judicial enforcement, an award must have a basis that

> is at least rationally inferable, if not obviously drawn, from the letter or purpose of the collective bargaining agreement . . . The requirement that the result of arbitration have "foundation in reason or fact" means that the award must, in some logical way, be derived from the wording or purpose of the contract . . .
>
> Brotherhood of Railroad Trainmen v. Central of Georgia Railway Co., 415 F.2d 403, 412 (5th Cir. 1969); cf. Local No. 370, Bakery, Confectionary and Tobacco Workers Intern. Union of America, AFL-CIO v. Cotton Brothers Baking Co., Inc., 672 F.2d 562 (5th Cir. 1982).

Id. at 268. It was further held by the Fifth Circuit in Machinists, District 776 v. Texas Steel ("Texas Steel II"), 639 F.2d 279 (5th Cir. 1981) that:

> As noted by this court in Texas Steel I, the Supreme Court establishes in the "Steelworkers Trilogy" that a court may not address issues that go to the "intrinsic merits" of a dispute, and must limit its review to (1) whether the subject matter of the dispute is "arguably arbitrable"; and (2) whether the award draws its "essence" from the collective bargaining agreement . . . "Arbitrability" is said to involve

> the jurisdiction of the arbitration panel, whereas the "essence" inquiry goes to the validity of the award.

Id. at 281-282 (citations omitted).

The Defendant does not seriously challenge Plaintiffs on the arbitrability issue. It is plain that the grievance was not excluded from the operation of the arbitration provisions. The grievance and arbitration provisions in the collective bargaining agreement were broad and all-inclusive. Specially, the term "grievance," as defined in the collective bargaining agreement, states that ". . . any misunderstanding, controversy or dispute between the company and the union, or between the company and the employees over the interpretation or application of the term of this agreement." Plaintiffs' Trial Exhibit No. 1 at pg. 34. Further, Article IX of the collective bargaining agreement states that "any matter that is

not adjusted" may be arbitrated "upon written request." Plaintiffs' Trial Exhibit No. 1 at pg. 13. Since the grievance itself states "the union contends . . . the agreement is being grossly violated," it is settled beyond peradventure that this grievance was "on its face" governed by the collective bargaining agreement. These are the only two questions the Court need address in answering the arbitrability question. Steelworkers v. Warrior & Gulf Navigation Co., supra; Steelworkers v.American Mfg. Co., supra. Based on the above, the Court finds that the dispute which is the subject of the present action was arbitrable.

## THE "ESSENCE" OF THE AGREEMENT AND THE ARBITRATOR'S AWARD

The Court's final inquiry in determining whether to enforce this award is whether it drew its "essence" from the collective bargaining agreement.

Machinists v. Texas Steel Co., ("Texas Steel I"), 538 F.2d 1116 (5th Cir. 1976), cert. denied 429 U.S. 1095. In determining the "essence" question the standard is to be interpreted "expansively so as to uphold the award, rather than restrictively." Texas Steel I, supra. As pointed out previously, to pass muster under this standard all the award need show is that it is "rationally inferable" that in "some logical way" it was "derived from the working or purpose of the contract." Brotherhood of RR Trainmen v. Central of Georgia Ry. Co., 415 F.2d at 411-412.

Still another statement of the Fifth Circuit rule is found in Safeway Stores v. American Bakery & Confectionary Workers, Local III, 390 F.2d 79 (5th Cir. 1968) wherein the Court said the following about the "essence" standard:

> On its face the award should ordinarily reveal that it finds its source in the contract and those circumstances out of which comes the "common law of the shop." . . . When it reasonably satisfies these requirements we think it is not open to the Court to assay the legal correctness of the reasoning pursued . . . We may assume, without here deciding, that if the reasoning is so palpably faulty that no judge, or group of judges, could ever conceivably have made such a ruling then the Court can strike down the award. But where it is not that gross the arbiter's error -- even though on an issue on which the reviewing Court would have arrived at a different decision does not ipso facto make the arbiter an outlaw or his erroneous action a matter outside the scope of the agreement to arbitrate, in excess of the terms of the submission or beyond his powers as an arbiter."

Id. at 82-83. While this Court might have interpreted the agreement differently, it is not this Court's job to "reason out a la judges the arbiter's award to see if it passes muster." Id. The arbitrator found that the disputed work was within the jurisdiction of the Defendant under its prime contract. He further found that by

not attempting to assert its jurisdiction or challenge that of the Army Corps of Engineers, it had violated the rights of the grievants under Article II-CWU-Section 4 of the collective bargaining agreement. According to the arbitrator the grievants' rights under this provision was to perform this work to the exclusion of all others, including the United States Army Corps of Engineers. While this reasoning may not be the soundest possible, it is what the parties bargained for and what they must accept. See Steelworkers v. Enterprise Wheel & Car Corp., supra.

The arbitrator's decision is lengthy and detailed, it applies the evidence adduced to the collective bargaining agreement, it has a basis in logic and fact; it is not arbitrary, capricious nor inadequately grounded in the basic collective bargaining contract. The Court does not believe that Arbitrator Carter

"dispensed his own brand of industrial justice" in this case. International Ass'n. of Machinists v. Hayes Corp., 296 F.2d 238, 243 (5th Cir. 1961), rehearing denied, 316 F.2d 90 (5th Cir. 1963). The Court finds that the arbitrator's award is "rationally inferable" from the collective bargaining agreement. Accordingly, the Court finds and so concludes that the award in this case drew its "essence" from the collective bargaining agreement.

While the Defendant prompts the Court to look closer at this award, the Court will decline this invitation. Once an award has passed muster under the "essence" standard, the Court impermissibly invades the province of the arbitrator if it delves further into the merits of the case. The Court is not allowed to review the arbitrator's award to determine its "legal accuracy" Texas Steel I, supra; or to determine whether

the arbitrator applied a "correct legal interpretation," International Association of Machinists v. Cameron Iron Works, 292 F.2d 112 (5th Cir. 1961); or, whether the award is "judicially acceptable." Machinists v. Modern Air Transport, Inc., 495 F.2d 1241 (5th Cir. 1974).

Provided the award has met the "essence" standard, the Fifth Circuit has held that the following are decisions within the exclusive province of the arbitrator. The scope of the issues before the arbitration panel, Waverly Mineral Products Co. v. United States Steelworkers of America, Local 8290, 663 F.2d 682, 685 (5th Cir. 1980); the proper burden of proof, Meat Cutters v. Neuhoff Bros. Packers, 481 F.2d 817 (5th Cir. 1973); procedural issues, Texas Steel II, supra; Boise Cascade Corp. v. Steelworkers of America, AFL-CIO, Local Union No. 7001, supra; the credibility of witnesses,

Papermill Workers v. St. Regis Paper Co., 363 F.2d 711 (5th Cir. 1966); the weight to be given evidence, Id.; the proper interpretation, construction and application of the collective bargaining agreement, Electrical Workers v. Markle Mfg. Co., 582 F.2d 9 (5th Cir. 1978); Machinists v. Modern Air Transport, Inc., supra; Papermill Workers v. St. Regis Paper Co., supra; the fashioning of an appropriate remedy, Texas Steel II, supra; Local No. 370, Baker, Confectionary and Tobacco Workers Intern. Union of America, AFL-CIO v. Cotton Brothers Baking Co., Inc., supra; United Steelworkers of America v. U. S. Gypsum Co., 492 F.2d 713 (5th Cir. 1973) cert. denied 419 U.S. 998; Minute Maid Co. v. Citrus Workers, Local 44, 331 F.2d 280 (5th Cir. 1964); and the resolution of factual issues and the finding of facts, Electrical Workers v. Markle Mfg. Co., supra; Papermill

Workers v. St. Regis Paper Co., supra; Local No. 370, Bakery, Confectionary, and Tobacco Workers Intern. Union of America, AFL-CIO v. Cotton Brothers Baking Co., Inc., supra.

In order for the Defendant to prevail in this case, the Court must find that the work in issue was in excess of the one hundred thousand dollar ($100,000.00) and that the exclusive jurisdiction to perform road work of this magnitude was vested by the federal government in the U. S. Army Corps of Engineers. In order for the Court to reach these conclusions, it would have to overturn specific findings of fact made by the arbitrator on these issues. The Court cannot do this; to do so would be to render judgment on the "intrinsic merits" of the case which the Court has no authority to do.

The arbitrator assayed the evidence in the record before him. He found that

the evidence which was offered in support of the Defendant's position on these issues was not credible. There the inquiry must end. One of the most important lessons which the "Steelworkers Trilogy" teaches is that the Defendant is not entitled to a de novo hearing in this Court to determine the weight and credibility of the evidence presented to the arbitrator. While the Defendant may be able to present to the Court more and different evidence on these issues than it presented to the arbitrator - it is too late now. The Court cannot reopen the record to take additional evidence which should have been presented to the arbitrator. If the Defendant, because of its failure to marshal and present all the available evidence, failed to carry its burden of proof before the arbitrator on these issues, then it must accept that loss.

## REMAND CONSIDERATIONS

Having determined that this grievance was arbitrable and that the award drew its "essence" from the collective bargaining agreement, the next issue is whether this award should be returned to the arbitrator for clarification. The rule is that an award should be returned to the arbitrator for clarification when it is patently ambiguous, when the issues submitted were not fully resolved, or when the language of the award has generated a collateral dispute. Oil, Chemical and Atomic Workers, Local 4-367 v. Rohm & Haas, 677 F.2d 492, 494 (5th Cir. 1982). In this case the arbitrator made it clear that the Defendant was liable for violation of the contract. As stated earlier, because of the absence in the record of the exact identity of all individuals entitled to a monetary payment under the award and the exact number of hours of work each was

deprived of, he refrained from awarding an exact dollar amount. As an alternative, he remanded the matter to the parties and ordered them to determine the identity of each person entitled to a monetary payment and the number of hours each should have worked and, therefore, the dollar amount to which each was entitled. The parties have met but have not been able to settle these issues. Therefore, the Court finds that the issues submitted to the arbitrator were not fully resolved. The Court also finds that the case should be remanded to the arbitrator for resolution of these issues.

The Defendant also recommends to this court that the arbitrator's award is ambiguous as to whether it has prospective application. The current collective bargaining agreement language has been substantially altered. The issue is if new road work were subcontracted by the Corps

of Engineers today, would the arbitrator's award apply in light of the changed contract language? The Plaintiffs do not contest the arbitrator's right to resolve this issue. Therefore, the Court finds that a patent ambiguity exists regarding this aspect of the award. Therefore, it is also the Court's finding that the award should be remanded to the arbitrator for clarification on this issue.

As the Fifth Circuit noted in Newspaper Guild, Local 25 v. Hearst Corp., 481 F.2d 821 (5th Cir. 1973) "the normal course of action in such cases . . . is for the court to remand the matter to the original arbitrator for clarification." Therefore, this Court will remand the case to the original arbitrator.

DECLARATORY RELIEF

Plaintiffs also sought relief in this case pursuant to the Declaratory Judgment

Act, 28 U.S.C. §§2201, 2202. Realizing that the award would have to be resubmitted to the arbitrator for clarification, they seek a declaratory judgment that the dispute is arbitrable and that so far as rendered the award drew its "essence" from the collective bargaining agreement. The Court finds that this case is appropriate for the granting of this relief as prayed for by Plaintiffs. Oil Workers International Union, Local 463 v. Texoma Natural Gas Co., 146 F.2d 62 (5th Cir. 1944), cert. denied 324 U.S. 872, 65 S.Ct. 1017 (1945); Allied Oil Workers Union v. Ethel Corp, 341 F.2d 47 (5th Cir. 1965).

ATTORNEY'S FEES

Although §301 of the Labor Management Relations Act of 1947 does not specifically provide for costs and attorney's fees, it is clear that when a challenge to

an arbitration panel's decision is without justification these costs are awardable. Texas Steel I, 538 F.2d at 1121; United Steelworkers v. United States Gypsum Co., 492 F.2d at 73; Local No. 370, Bakery, Confectionary and Tobacco Workers Intern. Union of America, AFL-CIO v. Cotton Brothers Baking Co., Inc., 673 F.2d at 564. Moreover, when determining whether a party's refusal to abide by an arbitration decision was "without justification" such as to authorize an award of attorneys' fees to the party seeking enforcement, it is of course not enough merely to conclude that because the challenge was unsuccessful, it therefore was "without justification." By parity of reasoning, however, the mere assertion that the grounds for a party's refusal to abide by the award concerned the arbitrator's power to make the award does not compel the conclusion that the party's position must

have been justified. Practically any contention could be so characterized. Rather, the court must look to the realities of the situation. Texas Steel II, 639 F.2d at 283. A party's complaint properly characterized as an attack on the "intrinsic merits" of an arbitration award, i.e., an arbitrator's interpretation of the grievance and his broad discretion in fashioning an appropriate remedy, is without merit, and a refusal to abide by a decision based upon such grounds is "without justification." Id. at 284. However, a case wherein a sincere challenge to the jurisdiction of the arbitration panel (arbitrability) or to the validity of the award (essence) is made would not be appropriate for the awarding of attorney's fees. Texas Steel I, 538 F.2d at 1122. See Local 179, United Textile Workers v. Western Textile Products Co., 374 F. Supp. 633 (E.D. Mos.

1974) (where jurisdiction and "essence" were "sincerely questioned"; award of fees would be inappropriate).

Looking at the realities of the situation, the Court cannot, in all honesty, hold that the Defendant's contention that the arbitrator's award was not within the "essence" of the collective bargaining agreement was a frivolous or wasteful challenge to the arbitrator's award. Accordingly, the Court, in duly exercising its discretion in this matter, has determined that the Defendant's refusal to abide by the award on this basis was not without justification. The Plaintiff's request for attorney's fees is therefore denied.

JUDGMENT SHALL ENTER ACCORDINGLY.

SIGNED this 23rd day of May, 1985.

/s/ William M. Steger
UNITED STATES DISTRICT JUDGE

IN THE MATTER OF ARBITRATION BETWEEN

| | | |
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| DAY & ZIMMERMANN, INC., LONE STAR DIVISION | § | |
| and | § | FMCS FILE 81K/04377 |
| INTERNATIONAL CHEMICAL WORKERS UNION, LOCAL 526 | § | |

BEFORE: Albert V. Carter, Arbitrator Selected through the procedures of the Federal Mediation and Conciliation Service

APPEARANCES:
Company: LeRoy Autrey, Attorney
Autrey & Weisenberger
P. O. Box 960
Texarkana, Ark-Tex 75504

Union: Jerry Levine, Attorney
P. O. Box 11690
Knoxville, Tennessee 37919

This matter came on for hearing in the Conference Room of Building I-6, Day & Zimmermann, Inc., Lone Star Army Ammunition Plant, Texarkana, Texas, October 6, 1981. The parties stipulated the matter was properly before the arbitrator but were unable to agree on the

precise issue to be decided and left that determination to the arbitrator. All witnesses were sworn and during the hearing the parties were given full opportunity to examine and cross-examine witnesses, present written exhibits and to otherwise fully develop their respective cases. At the close of the oral hearing, the parties waived oral closing summations and subsequently submitted written post-hearing briefs in a timely fashion.

## Background

Day & Zimmermann, Lone Star Division, operates the Lone Star Army Ammunition Plant, which is owned by the United States Government, under a contract with the Government. Several Unions, one of which is the International Chemical Workers, Local 526, party to this arbitration, represent various units of employees at the Plant.

Until September, 1980, members of ICWU, Local 526, in the job classifications of "Utility Operator" and "Maintenance Operator" assisted in the maintenance and repair of roads within the plant area. In September, 1980, the United States Corps of Engineers and its contractor started performing street repairs and maintenance work within the plant site without the assistance of Utility Operators and/or Maintenance Operators.

On November 10, 1980, the Union filed the following grievance:

> "The Union contention the work being done by Sub-Contractors of digging out and other related work in maintaince of street work on the plant site is work bargained for employees in the Chemical Workers Bargaining unit.
>
> The Union contends that Artical 1 (Gen. Cond.) of the agreement is being grossly violated."

The grievance alleged violation of Article 1, Sections 1, 2 and 3 of the contract and

requested that at least four (4) employees classified as Utility and four (4) employees classified as Maintenance Operator be recalled from lay off and paid the applicable rate of pay for time lost due to the alleged violation.

On November 12, 1980, the Company replied at the fourth step of the grievance procedure as follows:

> "This situation is not under Day & Zimmermann's jurisdiction. No violation of the contract; grievance and adjustment denied.

## Issue

Based on the grievance and evidence presented at the hearing, the Arbitrator determines the issue to be:

> Was the contract violated when maintenance and repair work on streets within the plant site was performed by persons not in the bargaining unit; and, if so, what shall the remedy be?

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various units is generally defined in the special provisions attached hereto. The work to be performed by employees in the various job classifications covered by this Agreement is more specifically defined in the job description for the job classification which has been agreed upon between the Company and the Union."

"ARTICLE I - CWU

"Recognition

"Sec. 1. The Company hereby recognizes the Union, pursuant to Section 9(a) of the Labor Management Relations Act of 1947, as amended, as the exclusive representative for the purpose of collective bargaining with respect to rates of pay, wages, hours of employment and other conditions of employment, for all employees in the Unit as set forth by the National Labor Relations Board in Case No. 16-RC-1187.

"Sec. 2. The Unit certified by the National Labor Relations Board as Case No. 16-RC-1187, is as follows:

"INCLUDED:
All employees in the Production Division, Inspection Division, Stores and Transportation Division and Maintenance Labor Department at the Lone Star Army Ammunition Plant.

"EXCLUDED:

All electrical maintenance employees, all truck drivers and dispatchers, all carpenters and their apprentices, all pipe fitters, plumbers, welders, boiler house operators and air compressor operators and their apprentices, all garage employees, all machine shop employees, all painters and their apprentices, all office, clerical and timekeeping employees, all plant security personnel, all medical employees, all professional employees and all supervisors as defined in the Act. Also excluded are: All heavy duty mechanics, dragline operators, crane operators, shovel operators, backhoe operators, tractor operators, and motor grader operators in Maintenance Division."

"ARTICLE II - CWU

"Working Conditions

* * * * * *

"Sec. 4. No persons excluded from the bargaining unit shall be permitted to perform any of the work customarily done by those employees included in the bargaining unit; provided, however, that work involved in technical experiments, pilot loading or work for other experimental or technical purposes is not

required to be performed by employees in the bargaining unit. Provided further that this does not exclude supervisors from instructing or demonstrating proper methods of work to employees, nor does it exclude supervisory personnel from performing work of employees covered by this bargaining unit during a shift crippled by employee absenteeism and where qualified replacements are not available from the bargaining unit."

"ARTICLE V - CWU

"Rates of Pay

"Sec. 1. The job classifications agreed upon and the rates of pay and effective dates of such rates of pay are set out in Exhibits "A," "B," "C," and "D" hereto."

"Exhibit "D"

"Maintenance Employees

| "Classification | | | | |
|---|---|---|---|---|
| Rubber Stamp Maker | * | * | * | * |
| Rubber Stamp Maker Leader | * | * | * | * |
| Maintenance Operator | * | * | * | * |
| Utility | * | * | * | * |
| Pest Control Operator | * | * | * | * |

"ARTICLE XVII

"Saving Clause

"It is the intention of the parties hereto to enter into an Agreement which is in strict conformity with all applicable federal and state laws and with the provisions of the Prime Contract under which the Contractor is operating this Plant. Should it be determined that any part of this Agreement is contrary to any such laws or any provisions of the Prime Contract, only that portion of this Agreement shall become null and void and the remainder of this Agreement shall remain in full force and effect."

"ARTICLE XV

"Coverage

"It is understood that the Lone Star Army Ammunition Plant is a Government-owned Plant which is being operated by Day & Zimmermann, Inc., under the provisions of Contract No.
DAAA-09-71-C-0289. The Company agrees that it will not attempt to avoid the terms and obligations herein contained by any consolidation, merger, transfer or change in the Legal Status, ownership or management of the Company."

"ARTICLE XXII

"Approval by the U. S. Army Armament Materiel Readiness Command

"The Company and the Union recognize that the Lone Star Army Ammunition Plant is owned by the United States of America and is being operated by the Company under a contract with the U. S. Army Armament Materiel Readiness Command. The terms and provisions of this contract shall not become effective until approval of this contract has been secured from the U. S. Army Armament Materiel Readiness Command.

"ARTICLE IV

"Management

"The Union fully recognizes that the Company has the exclusive duty and right to manage the Plant. This managerial function includes the right to determine the number of employees required in each job classification and shall include the organization, direction and control of all work. Provided, however, that this shall not in any manner abridge the rights of the Union or employees as provided for in this Agreement."

"ARTICLE IX

"Arbitration

"Sec. 1. Any matter that is not adjusted between the Company and the Union as provided for in the grievance procedure shall, upon written request of either party be referred to a Board of Arbitration consisting of one (1) representative of the Company, one (1) representative of the Union and an impartial chairman of the Board to be selected by these two (2) representatives. In the event that the two (2) representatives of the Board of Arbitration fail to select an impartial chairman of the Board within five (5) working days, a joint request shall be made to the Director of the Federal Mediation and Conciliation Service to submit a list of five (5) Arbitrators from which each party shall strike two (2) names. The remaining one shall be the impartial chairman of the Board. The request to the Federal Mediation and Conciliation Service shall specify that the list of five (5) Arbitrators shall not contain more than two (2) Attorneys nor more than two (2) representatives of labor. A majority decision of the Board shall be final and binding upon both parties."

* * * * * *

## Discussion and Opinion

The basic facts which resulted in the filing of the grievance in this matter are not in dispute, and the record is clear that although the grievance complains of work being done by sub-contractors, there is no proof of sub-contracting by the Company and the real issue revolves around the right of bargaining unit employees, specifically the classifications of Utility Operator and Maintenance Operator, to perform work customarily done by them to the exclusion of all other persons except as provided by Article II-CWU, Section 4 of the Contract.

The Company contends it has no control over the performance of maintenance work on the Streets and roads of the U. S. Government owned Lone Star Army Ammunition Plant by the U. S. Army Corps of Engineers. The Union argues that members of the bargaining unit who were on

lay off should have been recalled to perform the work they had customarily performed and is now being done by the Corps of Engineers.

Article XV recognizes that the Company only operates the Lone Star Army Ammunition Plant as a prime contractor under the provisions of a contract with the U. S. Government and Article XXII requires that the terms and conditions of the collective bargaining agreement be approved by the U. S. Army Armament Materiel Readiness Command before becoming effective. There is no evidence that the negotiated contract was not approved by the U. S. Army Armament Materiel Readiness Command and the Company did not suggest that it was not. Therefore, it is presumed the collective bargaining agreement was approved by proper authority and thus became a binding agreement.

The Company's contract with the Government to operate the Lone Star Army Ammunition Plant was not entered but Carl J. Evans, Industrial Relations Director, testified that a part of the contract is for the Company to maintain roads in the same areas where the Corps of Engineers is now performing road maintenance work. Evans also testified he knew of no restriction in the Company's contract with the Government to prevent the Company from performing work of the magnitude being done by the Corps of Engineers. He also testified that bargaining unit members were on lay off when the Corps of Engineers took over the road maintenance and repair, and the work could have been done by members of the bargaining units of the Chemical Workers Union and the Machinists Union.

The Company educed testimony from Carl Evans that it was not authorized to

perform work of the magnitude undertaken by the Corps of Engineers and that the Corps has the jurisdiction to do the work but, on cross-examination, it was brought out that Evans acquired his knowledge from correspondence he once read which stated that road work in excess of one hundred thousand dollars ($100,000.00) would be performed by the Corps of Engineers. Evans did not remember who wrote the letter, or when he read it, and the correspondence referred to by Evans was not offered so there is no way of knowing the identity of the writer, when the letter was written, nor if the author possessed the authority to issue such a directive. Therefore, in the absence of supporting evidence, the testimony of Evans cannot be given sufficient weight to prove the company was not authorized to perform road work in excess of one hundred thousand dollars ($100,000.00).

Furthermore, if it should be proven, which it is not, that all road work costing in excess of one hundred thousand dollars ($100,000.00) is to be performed by the U. S. Army Corps of Engineers, there is no proof that the work being done by the Corps would cost in excess of one hundred thousand dollars ($100,000.00). The only evidence in that respect came from Evans who testified he was told it would be a five year project and that he knew it would cost in excess of one hundred thousand dollars ($100,000.00). He did not say who told him, or when he was told, it was to be a five year project or just how he knew it would cost in excess of one hundred thousand dollars ($100,000.00) therefore his testimony cannot be deemed to prove the cost of the work exceeds one hundred thousand dollars ($100,000.00).

In conclusion, the Arbitrator finds the credible evidence is that the Company's Prime Contract with the Government includes road repair and maintenance within the area of the Lone Star Army Ammunition Plant and contains nothing to restrict the Company from performing road work costing in excess of one hundred thousand dollars ($100,000.00). The Company's claim that it has no jurisdiction over the road work performed by the Corps of Engineers is not persuasive and is not compatible with the credible evidence.

Article II-CWU - Section 4 of the Contract protects work customarily done by members of the bargaining unit for those employees included in the bargaining unit who have customarily performed such work with certain exceptions of which neither road repair or maintenance work or the U. S. Army Corps of Engineers are among

the exceptions. Absent proof that road repair and maintenance work is excluded from the provisions of Section 4, and that the U. S. Army Corps of Engineers is not excluded, the provision of Section 4 that protects work customarily done by members of the bargaining unit for those employees included in the bargaining unit cannot be construed to mean anything than what it clearly and precisely states.

If the alleged correspondence granting the Corps of Engineers exclusive jurisdiction over road repair and maintenance costing in excess of one hundred thousand dollars ($100,000.00) was prepared in conformity with an applicable federal law, state law, or a provision of the Prime Contract under which the Company operates the Lone Star Army Ammunition Plant, Article XVII of the collective bargaining agreement would have been activated thus nullifying that provision of

Article II-CWU - Section 4, which effectively prohibits the Corps of Engineers from performing road work customarily done by employees in the bargaining unit. But, the Company makes no such claim and there is no showing that the alleged directive was issued in conformity with federal law, state law, or a provision of the Prime Contract therefore such directive, if any, has no force and effect on any provision of the Contract between the parties.

It is undisputed that members of the bargaining unit in the classifications of Utility Operator and Maintenance Operator have for many years customarily performed road repair work within the perimeter of the Lone Star Army Ammunition Plant and there is no evidence to nullify their right to continue performing such work therefore this Arbitrator concludes that the Contract was violated when they were not given the opportunity to perform road

repair and maintenance as they had done in the past.

This decision is made by the Arbitrator with the full knowledge that the Company does not have control over the activities of the U. S. Army Corps of Engineers but it also must be recognized that the Company does have a binding collective bargaining agreement that has been properly approved by the appropriate Governmental Agency. That contract contains a provision protecting the work of members of the bargaining unit and cannot be abrogated, or abridged, absent a showing that such provision is contrary to federal law, state law, or a provision of the Prime Contract. The Contract must be upheld.

This Arbitrator does not agree with the Company's interpretation that the meaning of the phrase "work customarily done" in Article II-CWU - Section 4 is

limited to work which the Company is allowed to do under its contract with the U. S. Government. Customary, according to Webster, means "based on or established by custom: commonly practiced, used or observed." Thus, the meaning of "work customarily done," in the context of Section 4, can only mean work that has been commonly and regularly done such as the evidence shows Utility and Maintenance Operators performed road repair and maintenance at the Lone Star Army Ammunition Plant for a number of years up to September, 1980. What the Company is allowed to do under its contract with the Government has nothing to do with "work customarily done" as the phrase is used on the collective bargaining agreement.

The Company's argument that it has absolutely no control over the road maintenance work is not convincing and has no sound basis. True, the Company is not

authorized to perform any work not assigned to it and the Government furnishes all the money for the Company to carry out assigned work, but Carl Evans testified that a part of the Company's contract with the Government is for the Company to maintain roads, and the evidence is that the Company has been maintaining roads up until about September, 1980, when the U. S. Army Corps of Engineers let a contract for Lacy Construction Company to do road maintenance. Evans stated that when he became aware that the Corps of Engineers had let a contract he checked with the Director of Engineering of the Plant but failed to receive verification that the Company had jurisdiction of the work. There is no evidence that the Company challenged the right of the Corps of Engineers to subcontract the road maintenance work even though the Company had been performing the

work and its collective bargaining agreement with the Union contained a provision protecting work customarily done by bargaining unit employees from encroachment by persons outside the bargaining unit, and it is unknown whether or not the Corps of Engineers would have proceeded with the sub-contracting when faced with opposition from the Company.

The grievance filed by the Union asked for at least four (4) employees classified Utility and four (4) employees classified Maintenance Operator to be recalled from lay off and paid the applicable rate of pay for time lost, but there is nothing in evidence to show how many employees would have worked in each classification if it had not been for the action of the Corps of Engineers in taking over the road maintenance work. Neither is there anything in the record indicating the number of hours each employee would

have worked on road maintenance or for what period of time. It is also noted that language changes in the current collective bargaining agreement, which became effective in April, 1981, may, or may not, allow the Corps of Engineers, its contractors and/or sub-contractors to perform road maintenance work customarily done by members of the bargaining unit; and, if so, the effective date of the current contract could possibly act as an effective time limit or bar for wage claims under the grievance in the instant case.

Although it has been determined the contract was violated when maintenance and repair work on streets within the plant site was performed by persons not in the bargaining unit, I am reluctant to concoct a remedy awarding pay and/or a cease and desist directive in view of the above unknown factors. Therefore, the parties

shall meet without undue delay for the purpose of agreement on the identity of those employees deprived of road maintenance work by the actions of the U. S. Army Corps of Engineers, and the number of hours each such employee would have worked, and the amount of pay to which each is entitled under this Award; and the Arbitrator retains jurisdiction of this matter in the event the parties cannot agree.

## Award

The contract was violated when maintenance and repair work on streets within the plant site was performed by persons not in the bargaining unit.

The parties shall meet without undue delay for the purpose of agreement on the remedy as outlined above and the Arbitrator retains jurisdiction over this

matter in the event the parties cannot reach an agreement.

/s/ Albert v. Carter
Albert V. Carter, Arbitrator

Dallas, Texas
December 15, 1981

## EXCERPTS FROM THE 1981-1984 AGREEMENT

### ARTICLE XXXVI

Conditions of the Agreement

This Agreement supercedes all previous agreements between the contracting Union and the Company and includes the full Agreement between the contracting Union and the Company for the full term of this Agreement. This Agreement becomes effective when signed by the authorized representatives of the contracting Union and the Company and cannot be amended except by mutual agreement between the contracting Union and the Company reduced to writing and signed by their authorized representatives.

## STATUTORY PROVISIONS

### 28 USC §§ 2201 and 2202

§2201. Creation of remedy

(a) In a case of actual controversy within its jurisdiction, except with respect to Federal taxes and other than actions brought under section 7428 of the Internal Revenue Code of 1954 [26 USCS §7428] of a proceeding under section 505 or 1146 of title 11 [11 USCS §505 or 1146], any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such delaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

(b) For limitations on actions brought with respect to drug patents see

section 505 of the Federal Food, Drug, and Costmetic Act [21 USCS §355].

(As amended Nov. 6, 1978, P. L. 95-598, Title II, §249, 92 Stat. 2672; Sept. 24, 1984, P. L. 98-417, Title I, §106, 98 Stat. 1597.)

§2202. Further relief

Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.

(June 25, 1948, c. 646, §1, 62 Stat. 964.)

29 USCS §185

§185. Suits by and against labor organizations

(a) Venue, amount, and citizenship. Suits for violation of contracts between

an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

(b) Responsibility for acts of agent--Entity for purposes of suit--Enforcement of money judgments. Any labor organization which represents employees in an industry affecting commerce as defined in this Act and any employer whose activities affect commerce as defined in this Act shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a

district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

(c) Jurisdiction. For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

(d) Service of process. The service of summons, subpena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

(e) Determination of question of agency. For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

(June 23, 1947, c. 120, Title III, §301, 61 Stat. 156.)